

# **MEMORANDUM**

## **The Legacy of Supreme Court Justice John Paul Stevens, The Potential of Solicitor General Elena Kagan: Suggested Questions for the Senate Judiciary Committee**

### I. Executive Summary

Justice John Paul Stevens has served on the United States Supreme Court for more than three decades. During this time, he has stood out as a champion of women's rights. He consistently voted in favor of protecting women's reproductive rights, ending gender-based discrimination, and granting the right to privacy for LGBT people. As he retires from the Supreme Court, Stevens leaves behind an abundance of case law that has significantly benefited women across the country.

On May 10, President Barack Obama nominated Solicitor General Elena Kagan as the next potential justice on the United States Supreme Court. If confirmed, Kagan will be the fourth such woman in United States history. National Organization for Women (NOW) President Terry O'Neill argues the need for gender parity on the Supreme Court but notes that we need to learn more about Kagan's values and judicial philosophy, particularly those affecting women's reproductive rights.

Each new Supreme Court justice has the potential to significantly alter the direction of the Court. Therefore, it is vitally important that future justices be committed to protecting women's rights. During his time in office, President George W. Bush appointed both Chief Justice John Roberts and Associate Justice Samuel Alito to the Supreme Court, both of whom are decidedly unfriendly to women's rights. Since Roberts and Alito joined the Court, it has upheld restrictions on women's right to abortion care and drastically limited the remedies available to women to correct unequal pay for equal work. This demonstrates just how important it is to ensure that any new justice will protect and advance women's rights under the law. The rights of every woman are at stake with each Supreme Court nomination.

Kagan's views on a multitude of women's rights issues are unknown. Because of this, NOW recommends using Justice Stevens' legacy as a framework through which to analyze Kagan's beliefs on issues that are paramount to the fight for gender equality under the law. Stevens was a stalwart defender of women's rights and pushed the Court forward in a way that made the advancement of women possible. We hope that, if and when confirmed, Kagan will continue along the path that Justice Stevens created and work to ensure gender equality throughout the United States.

The following memorandum outlines major Supreme Court cases decided during Justice Stevens' tenure and uses this history to suggest questions the Senate Judiciary Committee should ask

Elena Kagan to help ascertain her commitment to upholding and advancing women's fundamental human rights.

## II. The Legacy of Justice John Paul Stevens

Justice Stevens has spent nearly 35 years as an associate justice on the United States Supreme Court. His tenure on the Court has been marked by immense social change, perhaps most importantly in the arena of women's rights. According to the National Women's Law Center (NWLC), Justice Stevens has been "part of five votes which made all the difference in protecting bedrock legal rights and principles." Women's rights advocates found an ally in Justice Stevens. The categories in which he made a marked impact for women include privacy/reproductive rights, sex and race discrimination in education and employment, Equal Protection Clause jurisprudence, and health and safety regulation under the Commerce Clause.

These categories represent a large portion of Justice Stevens' contributions to contemporary jurisprudence, and it is appropriate and illustrative to view the nomination of Solicitor General Elena Kagan within the framework of Stevens' legacy. This memorandum will use some of Justice Stevens' major contributions to the Court as a guide for inquiries as to Kagan's views on important constitutional issues.

Though the media have been buzzing with commentary since Kagan was nominated, very little is known about Kagan's personal legal philosophy and her views on important issues. NOW strongly recommends a thorough and comprehensive line of questioning to probe Kagan's views and provide insight into what type of justice she will be if she is confirmed as the next member of the Court.

## III. Questions for Elena Kagan in Critical Areas of Constitutional Law

### A. *Judicial Philosophy*

Generally, a Supreme Court justice is broadly categorized in terms of her or his "judicial philosophy." The various terms used in regard to judicial philosophy are subject to debate and often interpreted with an emphasis on a political spectrum from conservative to progressive. Nevertheless, it is important for Kagan to identify her basic judicial philosophy, in particular her views on the role of precedent (or *stare decisis*), textual interpretation, and recognition of the United States Constitution as a living document that responds to the realities of the modern world and is relevant to the everyday lives of ordinary people.

### **SUGGESTED QUESTIONS FOR THE SENATE JUDICIARY COMMITTEE**

1. How would you describe your judicial philosophy?
2. How important is the role of precedent, or *stare decisis*, in judicial decision-making?
3. When, if ever, is it important for the Court to break from established precedent?

## B. Reproductive Rights

Reproductive rights have been hotly debated and contentious since the 1965 case *Griswold v. Connecticut*, when the Supreme Court first affirmatively recognized individual privacy rights as the foundation for reproductive rights in the U.S. Constitution. Since then, interpretation of right to privacy and reproductive rights has fluctuated from *Roe v. Wade* (1973), which recognized that a woman's decision to have an abortion was protected by the Constitution, to *Gonzales v. Carhart* (2007), in which the Court upheld a federal law prohibiting an abortion procedure with no exception to protect a woman's health, even though, for many women, the procedure would be the safest and most medically appropriate means of terminating a pregnancy gone disastrously wrong.

During his tenure, Justice Stevens has been ardently committed to preserving the right to privacy and has acknowledged the life-or-death importance of a woman's ability to decide what is appropriate for her own health and body. He voted repeatedly to uphold reproductive rights and strongly dissented when the Court upheld restrictions on the right to choose. In *Planned Parenthood v. Casey* (1992), Stevens' concurring opinion reaffirmed the essential holding of *Roe* and said that the case was "an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."<sup>1</sup> In *Carhart*, Stevens joined Justice Ginsburg's passionate dissent, strongly disagreeing with the majority's decision to uphold a federal ban on safe, medically appropriate abortion procedures. Another important case in which Stevens dissented was *Harris v. McRae* (1980), where the Court approved a prohibition on government funding of medically necessary abortions, a ruling that penalizes low-income women who do not have the financial resources to obtain an abortion.

Justice Stevens fiercely defended a woman's right to choose; it is vitally important that the next Supreme Court justice be equally committed to continuing this impressive facet of Stevens' legacy. Right-wing extremists are constantly attacking the legal underpinning of the right to an abortion. To ensure that this right will not be diminished, Elena Kagan's views on the issue must be thoroughly examined.

### **SUGGESTED QUESTIONS FOR THE SENATE JUDICIARY COMMITTEE**

1. Do you believe the United States Constitution guarantees the right to privacy?
2. Do you believe the right to privacy is an integral part of the concept of liberty? In other words, do you believe the right to privacy is a fundamental right?
3. Do you consider *Roe v. Wade* (1973) to be a currently controlling precedent?
4. Do you support the essential holding of *Roe v. Wade*?
5. Do you believe restrictions on abortion should include a broad exception for a woman's health?
6. What, in your view, constitutes an "undue burden" on a woman seeking an abortion?
  - a. How would you define a "substantial obstacle" to a woman seeking an abortion?
7. Do you believe there is a legal basis for extending constitutional rights to fetuses?
  - a. If yes, do you believe that requires a significant break from well-established precedent?
8. Do you believe religious concerns play a role in determining whether the state has an interest in limiting access to abortion?
9. In *Gonzales v. Carhart*, Justice Kennedy stated that "a safe abortion technique can be banned in order to protect women from regretting their choice to have that procedure." Do you believe the state can rely on gender stereotypes as a legal justification for limiting access to abortion?
10. When a law that restricts abortion lacks a health exception, do you believe such law can be challenged on its face?

### C. Sex Discrimination

Sex discrimination law has changed dramatically during Justice Stevens' time on the Court. Many decisions in which Stevens played a key role expanded and enhanced protections for women against discrimination.

In the realm of education, Justice Stevens has helped lead the Court to a strong conception of Title IX, which prohibits sex discrimination in education. He took part in decisions that recognized a damages remedy under Title IX for sexual harassment -- that individuals whose rights were violated under Title IX had a right to go to court to seek a remedy and that schools could be held liable for student-to-student sexual harassment.<sup>2</sup>

Just as importantly, rights against sex discrimination in the workplace have been strengthened during Stevens' era. Stevens joined the plurality opinion in *Price Waterhouse v. Hopkins* (1989), an important case in which the Court held that failure to promote a female employee based on

sex-stereotyping was actionable under Title VII. Title VII has been crucial in protecting individuals from discrimination at work, and Stevens has been largely in favor of protective interpretations of the statute. In 2007, Stevens dissented in the *Ledbetter v. Goodyear* (2007) case, in which a 5-4 majority held that women must file equal pay claims within 180 days of the initial wage-setting decision, even when they were not aware for many years that they were being paid less than men in the same level positions. Stevens also argued for strong protections for women against retaliation for reporting discrimination and against pregnancy-related discrimination.

Stevens has argued in favor of a strong prohibition against sex discrimination under the Equal Protection Clause of the Constitution. This rationale was used in important cases such as *Craig v. Boren* (1976), which subjected sex-based distinctions to a heightened form of scrutiny, and *United States v. Virginia* (1996), in which the Court held that women cannot be excluded from the Virginia Military Institute based on gender stereotypes. Both of these cases were hugely important in strengthening the status of women as equal to men under the law. In particular, the decision in *Craig v. Boren* in particular was critical, as it required the Court to engage in a deeper analysis of legislation that classifies or singles out women.

In sum, the Court's interpretation of the law regarding sex discrimination has been vitally important to the success and fair treatment of women in education and the workplace. It is paramount that Kagan be committed to maintaining the rights that women have won over the past 35 years.

#### **SUGGESTED QUESTIONS FOR THE SENATE JUDICIARY COMMITTEE**

1. Do you believe that gender-based classifications require at least a heightened form of scrutiny?
2. Do you support a strong interpretation of Title IX and Title VII? Do you believe these pieces of legislation are important to securing equal treatment for women and men?
3. Do you believe that it is inappropriate for a legislature to use gender stereotypes to bar women or men access to certain educational and vocational opportunities?

#### *D. Health and Safety Regulations*

Congress has traditionally held broad powers to legislate matters of public health and safety. The authority to do so primarily comes from the Commerce Clause of the Constitution. From roughly 1995 to 2000, the Supreme Court moved toward a more restrictive view of this power. Invoking "states' rights," the Court began to place restraints on Congress' power to legislate under the Commerce Clause.

Two landmark cases in which Justice Stevens dissented were *United States v. Morrison* (2000), which curtailed legislation that attempted to reduce violence against women, and *United States v. Lopez* (1995), which curtailed legislation that attempted to keep schools free from guns and gun-

related violence. Justice Stevens favored a broad view of Congress' power to legislate in these important areas, and according to the NWLC, he "took a leading role in mustering further majorities to put an end" to the sort of thinking that prevailed in *Morrison* and *Lopez*.<sup>3</sup> In a major decision issued after these two cases, Justice Stevens wrote the majority opinion in an important case that helped to re-implement a broad interpretation of Congress' Commerce Clause powers.

It is clear that Justice Stevens' career served to maintain the power Congress has to legislate under the Constitution. This power enables Congress to enact legislation to provide a number of important advancements for women, including protection from domestic violence and legal remedies for discriminatory violations from employers and government entities. NOW hopes that Elena Kagan will advocate, as Justice Stevens did, for Congress to have a strong legislative power under the Constitution.

#### **SUGGESTED QUESTIONS FOR THE SENATE JUDICIARY COMMITTEE**

1. How broad do you believe Congress' legislative powers are under the Commerce Clause of the Constitution?
2. Do you believe Congress should have latitude in determining health and safety regulations under the Constitution?
3. Would you favor a narrowing of Commerce Clause power, as indicated in cases such as *United States v. Morrison* and *United States v. Lopez*?

#### *E. LGBT Rights*

During Justice Stevens' time on the Court, it has played an important role in foundational cases that established a right to privacy for all, including lesbian, gay, bisexual, and transgender people. The first case heard by the Court regarding this issue was *Bowers v. Hardwick* (1986), in which the Court held that a criminal anti-sodomy law did not violate the right to privacy. Stevens dissented in *Bowers*, which was overturned nearly 15 years later in *Lawrence v. Texas* (2003). Stevens was in the Court's majority in *Lawrence*, which found a state statute prohibiting same-sex sexual activities in violation of the Constitution.

The Court's decision in *Lawrence* was a landmark step toward equality for LGBT people, and Stevens' participation in that decision was crucial. It is very important that the next Supreme Court justice agree with the fundamental principal at issue in *Lawrence*, and NOW hopes that Elena Kagan will expand Stevens' legacy in any future cases where the constitutionality of discrimination on the basis of sexual orientation is in question.

#### **SUGGESTED QUESTIONS FOR THE SENATE JUDICIARY COMMITTEE**

1. Do you believe the constitutional right to privacy applies to intimate, private relations, regardless of the sexual orientation of the acting individuals?
2. Do you consider yourself committed to recognizing and upholding the fundamental rights of gay, lesbian, bisexual, and transgender individuals?

#### F. *Diversity and Civil Rights*

In several cases, Justice Stevens voted to expand diversity in education and protect the rights of people of color. Justice Stevens was part of the majority in *Grutter v. Bollinger* (2003), a decision in which the Court upheld a law school admissions policy that considered race as one of many factors in admissions decisions. This case was monumental in the Court's history, as it clearly determined that the states have a compelling interest in diversity in education.

Justice Stevens issued a strong dissent in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), a case that limited the use of race in determining student placement in primary and secondary education.

Justice Stevens' time on the Court was marked by an understanding of the complexities and realities of the law's treatment of race. His opinions often displayed an awareness of the impact of racial classifications and reflected the need for racial equality. The fight for racial equality is still very real, and it is therefore crucial that the next member of the Supreme Court have a deep understanding of the complexities of race in the law.

#### **SUGGESTED QUESTIONS FOR THE SENATE JUDICIARY COMMITTEE**

1. Do you believe that the state has a compelling interest in promoting racial diversity in education?
2. Do you believe the law thus far has adequately addressed concerns of racial inequality?
3. Do you believe there are areas of the law that have yet to promote the concept of full racial equality?
  - a. If so, which areas?

#### IV. Recommendations

While NOW is encouraged to see that the Supreme Court bench may soon welcome the fourth woman in its 221-year history, we approach the confirmation hearings of Elena Kagan with a

clear understanding of the stakes for all women. Justice Stevens was a strong and extremely intelligent guardian of women's rights, and we vigorously applauded the enormous impact he made on the United States during his tenure as associate justice.

The questions suggested above will allow the Senate and the public to get a better idea of what type of justice Elena Kagan would be. The future of women's status under the law will be heavily influenced by the Supreme Court for many years to come. For this reason, women need Elena Kagan to be deeply committed to the principles of fairness and justice that Justice John Paul Stevens has tirelessly defended.

*Prepared with the assistance of NOW Foundation Law Intern Elizabeth A. Skarin*

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<sup>1</sup> *Justice Stevens' Legacy for Women's Legal Rights*, NATIONAL WOMEN'S LAW CENTER, 1, <http://www.nwlc.org/pdf/justicestevensfactsheet.pdf> (quoting from *Planned Parenthood v. Casey* (1992))

<sup>2</sup> *Justice Stevens' Legacy for Women's Legal Rights*, NATIONAL WOMEN'S LAW CENTER, 5, <http://www.nwlc.org/pdf/justicestevensfactsheet.pdf>

<sup>3</sup> *Justice Stevens' Legacy for Women's Legal Rights*, NATIONAL WOMEN'S LAW CENTER, 6, <http://www.nwlc.org/pdf/justicestevensfactsheet.pdf>